Office Supreme Court, U.S.
FILED
SEP 14 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-708

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

SUMMA CORPORATION,
Petitioner

VS.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE URGING AFFIRMANCE

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant
Attorney General

JIM MATHEWS
Assistant Attorney General
Chief, Environmental
Protection Division

R. LAMBETH TOWNSEND
Assistant Attorney General
Environmental Protection Division

GINNY AGNEW
Assistant Attorney General
Environmental Protection Division

P.O. Box 12548
Austin, Texas 78711
(512) 475-4143

ATTORNEYS FOR AMICUS CURIAE
STATE OF TEXAS

TABLE OF CONTENTS

Page

TABLE OF CITATIONS ii

QUESTION PRESENTED 1

INTEREST OF AMICUS CURIAE 2

SUMMARY OF THE ARGUMENT 2

ARGUMENT AND AUTHORITIES 4

CONCLUSION 11

CERTIFICATE OF SERVICE 12

INDEX OF AUTHORITIES

Page

Gulf Holding Company v. Brazoria County, 497 S.W.2d 614 (Tex.Civ.App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.) 8

Humble Refining Co. v. Sun Oil Co., 190 F.2d 191 (5th Cir. 1951) 5

Illinois Central R.R. Co. v. Illinois, 146 U.S. 387 (1892) 7

Luttes v. State, 159 Tex. 500 324 S.W.2d 167 (1959) 5,9

Manry v. Robison, 122 Tex. 213, 56 S.W.2d 438 (1932) 10

McCurdy v. Morgan, 265 S.W.2d 269 (Tex.Civ.App.—San Antonio 1954, writ ref'd) 10

Moody v. White, 593 S.W.2d 372 (Tex.Civ.App.—Corpus Christi 1979, no writ) 8

Rosborough v. Picton, 34 S.W. 791 (Tex.Civ.App. 1896, no writ) 6

Seaway Company, Inc. v. Attorney General, 375 S.W.2d 923 (Tex.Civ.App.—Houston 1964, writ ref'd n.r.e.) 8

State v. Valmont Plantations, 346 S.W.2d 853 (Tex.Civ. App.—San Antonio, 1961), *opinion adopted and aff'd* 355 S.W.2d 502)(Tex. 1962) 6,9

United States v. 1, 078.27 Acres of Land, 446 F.2d 1030 (5th Cir. 1971) 5

Statutes

TEX. NAT. RES. CODE ANN. §21.001(3)(Vernon's, 1978) 10

TEX. NAT. RES. CODE ANN. §§33.001 *et seq.* (Vernon's, 1978) 7

TEX. NAT. RES. CODE ANN. §33.001 (Vernon's, 1978) 3,7

TEX. NAT. RES. CODE ANN. §33.001(c) (Vernon's, 1978) 7

TEX. NAT. RES. CODE ANN. §33.056 (Vernon's, 1978) 7

TEX. NAT. RES. CODE Chapter 61 (Vernon's, 1978) 3,8

TEX. PARKS & WILD. CODE ANN. §1.011 (Vernon's, 1976) . . 3,7

TEX. WATER CODE §5.301 *et seq.* (Vernon's Supp. 1982-83) 4,8,9

Other

Taylor, *The Spanish Archives of the General Land Office of Texas* (1955) 2

NO. 82-708

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

SUMMA CORPORATION,

Petitioner

VS.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE URGING AFFIRMANCE

This brief is submitted by the State of Texas, by and through the Attorney General of Texas, Jim Mattox.

QUESTION PRESENTED

Does California hold a public trust interest in the tidelands located within a former Mexican grant which was originally acquired by private owners from the Mexican government and subsequently patented to those individuals by the United States government in accordance with the Treaty of Guadalupe Hidalgo?

INTEREST OF AMICUS CURIAE

Title to more than twenty-six million acres of land in Texas is based on Spanish and Mexican land grants. Taylor, *The Spanish Archives of the General Land Office of Texas*, (1955) p. 2. Texas courts, therefore, have long been involved in interpreting Spanish and Mexican law as it pertains to these grants. In this regard Texas courts have recognized the existence of a public trust doctrine under Spanish and Mexican law and have based their holdings upon it. The public trust interest is a concept so thoroughly incorporated into Texas law that a decision at this juncture extinguishing that trust under Spanish and Mexican grants would wreak havoc to more that a century of legal precedent. It is, therefore, of paramount concern to the State of Texas that this Court either recognize the existence of a public trust doctrine under Mexican and Spanish law or limit any decision so that it will not erode the public trust doctrine as it has evolved in Texas.

SUMMARY OF THE ARGUMENT

At issue in the present case is whether the law in effect in Mexico at the time of the grant of Balloona Lagoon incorporated a version of the public trust doctrine which would have attached to the subject property. Texas courts have resolved many of the issues inherent in this inquiry as they have interpreted Spanish and Mexican land grants in light of the law in effect at the time of those grants. We feel, therefore, it will be insightful to examine those Texas decisions even though they are not binding on this Court. Subsequent developments of law in Texas that rely upon the existence of a public trust doctrine under Spanish and Mexican law will be outlined.

The public trust doctrine is not easily summarized. It arises from an acknowledgment that there is a strong public interest in the waterways of a nation. Land that is covered by those waterways or in some instances adjacent to the waterways is held by the sovereign in trust for the use of the general public. Texas has long acknowledged the existence of this doctrine and has found the roots to be in both civil and common law.

In his Amicus brief on the merits of this case, the Solicitor General has misstated the role that Spanish and Mexican law play in interpreting Spanish and Mexican land grants. It is well established in Texas that the law in effect at the time of the grant of land is the controlling law for interpretations of that grant.

Public trust notions under Mexican and Spanish civil law have played an integral part in the development of Texas law governing definition and allocation of rights in the state's natural resources. Particularly pertinent examples include the determination of public and private rights in coastal areas along the Texas Gulf of Mexico and in the many inland watercourses in the state.

Several statutes have been enacted in Texas that rely on the public trust's application to Spanish and Mexican grants as well as all other grants. The clearest examples of this are TEX. NAT. RES. CODE §33.001 (Vernon's, 1978)(See Appendix A) and TEX. PARKS & WILD. CODE §1.011 (Vernon's, 1976)(See Appendix B). The language employed in §33.001 and to a lesser degree in §1.011 mirrors the traditional principles of public trust.

The Texas Open Beaches Act, Chapter 61 of the TEX.NAT.RES. CODE (Vernon's, 1978)establishes the policy that the state must protect the beaches on the Gulf Coast for the use of the general public. (See Appendix C) The Texas Water Rights Adjudication Act TEX.

WATER CODE §5.301 et seq. (Vernon's Supp. 1982-83) relies in a more complex way upon the distinction that exists between the civil law public trust and the common law. (See Appendix D) In each of these enactments, however, the legislature has relied upon the existence of public trust under both Spanish and Mexican law and under the common law.

Texas courts have shaped two doctrines that are based upon public trust theory and acknowledge the need to apply the law in effect at the time of the grant. In one instance they have set up two separate means of determining where the shoreline is. One that follows the Spanish and Mexican rule and is applicable to early grants and a different measure for those grants made after Texas became a Republic.

The other doctrine is a compromise of the conflicting rules for ascertaining ownership by the State of all navigable streams. This is the "30-foot" rule. Each of these doctrines will be discussed at length below to demonstrate the ways in which Texas relies upon the existence of the public trust doctrine in both of its predecessors, the civil law and the common law.

The California Supreme Court has found that the State is the trustee for the public's interest in tidely influenced land which was granted under a Mexican grant. There is no Texas case involving the fact situation presented by the present case. As will become apparent to this Court a decision undermining the existence of public trust under Spanish and Mexican law would have a disruptive effect in Texas.

ARGUMENT AND AUTHORITIES

A. The Law in Effect at the Time of the Grant Controls.

The threshold question to be addressed is what law controls in this lawsuit. The Solicitor General has said that the only reason to look to Mexican law is to resolve ambiguity in the confirmation decree or patent. (Brief on the merits for the United States p. 6) In a footnote he further states that federal law should control because of the federal confirmation proceeding.

Both of these positions are incorrect. It was agreed by the parties and acknowledged by the courts that Mexican law did govern the interpretation of the grant. (*See e.g.*, Petitioner's Appendix p. 8) Texas has long recognized that the law in effect at the time land is granted controls in subsequent interpretations of the nature of the grant.

> We harbor no doubt that the Mexican (Spanish) law, whatever it may be, in effect at the date of the grant, is what must furnish the applicable rule, and that such is the effect of every decision, observation or assumption that has ever been made by this Court on the subject.... (citations omitted)

Luttes v. State, 159 Tex. 500, 34 S.W.2d 167, 176 (1959).

As to the issue of applying federal law we would draw the Court's attention to *United States v. 1,078.27 Acres of Land*, 446 F.2d 1030, 1040 (5th Cir. 1971) in which Texas law is applied in a suit by the Government to establish a proprietary interest in the land in dispute. (See also, *Humble Refining Co. v. Sun Oil Co.*, 190 F.2d 191, 198 [5th Cir. 1951] "The obligation of the federal courts to follow the local law in land litigation existed before *Erie*...")

Ascertaining exactly what law was in effect at the time of the grant is less straight forward. Texas courts

have allowed expert opinion testimony on Spanish and Mexican law to ascertain what law controlled at the time of a land grant as was used in this California case. *State v. Valmont Plantations*, 346 S.W.2d 853, 865 (Tex.Civ.App.—San Antonio, 1961), *opinion adopted and affirmed* 355 S.W.2d 502, Tex. 1962) (hereafter referred to as *Valmont*).

In *Valmont* Justice Pope did an exhaustive analysis of Mexican and Spanish law which should serve as a model for all subsequent interpretors of Spanish and Mexican grants. Justice Pope makes it clear that a number of sources which may seem archaic, must be searched to establish the legal principles in existence at the time of the land grant in question. The Solicitor General has implied that the California Court was contorting the law by looking to *Las Siete Partidas* whereas, Justice Pope states "... it was and is often necessary to search former codes as well as the more recent ones. *Las Siete Partidas* ... is recognized as the essence of the law of Peninsular Spain after 1348," *Valmont, supra* at 859. The rule of interpretation was to look first to the *Recopilacion de Leyes de Los Reinos de las Indias (Recopilacion)* and later decrees and if they are silent then to look to *Las Siete Partidas*. Therefore, the California Courts reliance on *Las Siete Partidas* was not misplaced nor an attempt to liberate themselves from legal shackles as has been suggested (see brief on the merits for United States p. 4).

B. Texas Statutes Based on Public Trust Concepts

On the Texas Gulf Coast, the State owns in trust for the public the submerged lands of the gulf, bays, inlets, and other tidally-influenced areas. *Rosborough v. Picton*, 34 S.W. 791, 792 (Tex.Civ.App. 1896, no writ). These submerged lands are the Texas equivalent to California's "tidelands," which are the subject of the instant case. The public trust interest of Texas in its

submerged lands is a product of both Mexican and Spanish law and the Anglo-American common law governing public rights in coastal areas.

An example of Texas coastal public trust interests is found in the Texas Coastal Public Lands Management Act, TEX. NAT. RES. CODE §§33.001 et seq. (Vernon's, 1978) With this enactment, the state has sought to organize its management of the state-owned submerged lands, particularly with regard to the granting of leases and easements therein (§§33.101-33.134) and the specifications of structures placed thereon (§33.056). Guiding this management initiative is the declared policy that "[u]ses [of coastal public lands] which the public at large may enjoy and in which the public at large may participate shall take priority over these uses which are limited to fewer individuals." TEX. NAT. RES. CODE §33.001(c)(Vernon's, 1978). (See Appendix A)

Such Texas policies as this and TEX. PARKS & WILD. CODE §1.011 (Vernon's, 1976) have evolved from a tradition of law drawing much of its vigor from the Spanish and Mexican notions of the public trust in tidally-influenced areas, as well as from *Illinois Central R.R. C. v. Illinois*, 146 U.S. 387 (1942) and its progeny. TEX. NAT. RES. CODE §33.001 (Vernon's, 1978) and TEX. PARKS & WILD. CODE §1.011 (Vernon's, 1976) both assert title to the land is held by the State. (See Appendix A and B) Another statute which is the descendant of the Mexican and Spanish law principle that the seashores are held in common by all is the Texas Open Beaches Act. Texas has developed an "open beaches" concept which protects public use and access to all parts of the Gulf of Mexico beach situated between the line of mean low tide and the upland vegetation line, even though that portion of the beach upland of mean high tide is often in private ownership.

Historically, the general public in its use and enjoyment of the state-owned wet beach has made extensive use of pathways to the beach and the dry sand portions of the beach. Texans have for decades utilized the dry beach for fishing, camping, picnicking, driving, and general recreation. Texas law has come to recognize that, in pursuit of its use of the Gulf Coast waters, the public has acquired rights of use over the dry beach through prescription, dedication and custom. Thus, even over privately owned beachfront land, the public enjoys a right of use and access.

This "open beaches" right in the public is safeguarded in state statute, Chapter 61, TEX. NAT. RES. CODE (Vernon's, 1978), which charges various public prosecutors, including the Texas Attorney General, with the duty of protecting and enforcing public access. (See Appendix C for policy statement) The Texas courts have responded by uniformly prohibiting the erection of fences and other structures which interfere with public access on and across the Gulf of Mexico beaches. See: *Moody v. White*, 593 S.W.2d 372 (Tex.Civ.App.—Corpus Christi 1979, no writ); *Gulf Holding Company v. Brazoria County*, 497 S.W.2d 614 (Tex.Civ.App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.); *Seaway Company, Inc. v. Attorney General*, 375 S.W.2d 923 (Tex.Civ.App.—Houston 1964, writ ref'd n.r.e.). Much of the basis for the Texas adherence to the open beaches concept is the preservation of meaningful public access to that which has always belonged to the public: submerged lands. Entwined in the evolution of the Texas Open Beaches policy is the inherent public trust nature of coastal submerged lands.

The last statute that will be discussed is TEX. WATER CODE §5.301 (Vernon's Supp. 1982-83) known as the Water Rights Adjudication Act. This Act was established as part of the state's police power and as

in such is less directly relevant here. However, Spanish and Mexican grants are distinguished from other grants under this Act in such a way as to shed some light on the issue before this Court. As stated in §5.302 Declaration of Policy (see Appendix D) this Act is intended to make the most beneficial use of water for the public. The Act attempts to record both riparian and appropriative claims for the surface water resources of the State. The water is owned by the State but the water can be used by individuals to the extent determined by the adjudication process.

Justice Pope in *Valmont* drew the distinction that is generally relied upon in adjudication proceedings, that a riparian irrigation right did not exist under Spanish and Mexican grants unless there was specific language in the grant conveying an interest in water. Citing both *Las Siete Partidas* and *Recopilacion* Justice Pope indicates that the Spanish and Mexican law as applied in Mexico was very protective of the public's rights. Though the law discussed in *Valmont* is not dispositive of the issues in this case, it abrogates the statements of the Solicitor General that a public trust doctrine did not exist under Mexican law.

C. Shoreline and Navigable Streams Judicially Defined

Texas has a shared legal tradition of civil and common law. This common source of legal tradition was tapped by the Texas courts to finally decide an important coastal resource issue: the landward boundary of the state-owned submerged lands along the Texas Gulf Coast. In the landmark decision of *Luttes v. State*, 159 Tex. 500, 324 S.W.2d 167 (1959), the Texas Supreme Court looked extensively to Mexican civil law, as well as common law, to determine the landward extent of the coastal tide, and thereby to establish the boundary of the public trust. The Court devoted considerable atten-

tion to the concept of the "shore" under Mexican legal tradition in arriving at its conclusion that littoral grants out of the Spanish and Mexican sovereigns conveyed title only to the line of "mean higher high" tide. The contrasting common law rule places the coastal title boundary further seaward at the line of "mean high" tide. Accordingly, with regard to Spanish or Mexican grants, Texas law now recognizes the extent of state ownership in submerged lands, and therefore the extent of its coastal public trust interest, as runnning to the line of mean higher high tide when dealing with Spanish or Mexican grants.

A further example of Texas' reliance on the public trust doctrine is expressed in the law relating to the ownership of the river beds. The traditional view has been that the sovereign was owner of the rivers and its beds and bottoms and held them in trust for the public use. There has been some difference in application from common law to civil law as to which rivers were burdened with the public trust. In American law the test has been navigability in fact which was a practical adaptation from the English rule of the sovereign owning the river bottoms subject to the ebb and flow of the tide. The Crown was owner of the sea and so long as rivers were subject to the tides they too were an arm of the sea. Mexican law did not distinguish on the basis of navigability but on whether the stream was intermittent or continuous. The beds of streams that regularly flowed were held in common, whereas stream bottoms which are intermittent could be privately owned. See especially *Manry v. Robison*, 122 Tex. 213, 56 S.W.2d 438 (1932). *McCurdy v. Morgan*, 265 S.W.2d 269 (Tex.Civ.App.—San Antonio 1954, writ ref'd).

In 1837 the Republic of Texas enacted the "thirty foot rule" which today is codified in TEX.NAT.RES.CODE §21.003(3). (Vernon's, 1978) "Navigable Stream" means

a stream which retains an average width of 30 feet from the mouth up. This eliminated the concern with whether a stream was navigable in fact and now includes rivers that may not have been covered in either the common law rule or under the civil law, thereby potentially extending the state's ownership.

The definitions of shoreline and navigability make two important points: first, that Texas has recognized a distinction between grants under Mexican and Spanish law and other grants; and second, that the public trust interest was evident under Mexican and Spanish law.

CONCLUSION

Though Texas law rarely speaks of the public trust doctrine per se, the principle that certain lands are held in trust for the benefit of the general public is expressed repeatedly in Texas. We have continuously relied upon the existence of this doctrine under Spanish and Mexican law. It is late in the day to be attacking the very foundation of such public trust concepts, as the Solicitor General has done. It could only work against the public interest in developed and developing Texas coastal law to adopt the position of the United States that Mexican and Spanish antecedants of the public trust doctrine are too ephemeral to underlie modern uses of the doctrine.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant
Attorney General

JIM MATHEWS
Assistant Attorney General
Chief, Environmental
Protection Division

R. LAMBETH TOWNSEND
SBN 20167500
Assistant Attorney General

GINNY AGNEW
Assistant Attorney General

P.O. Box 12548
Austin, Texas 78711
(512) 475-4143

CERTIFICATE OF SERVICE

I, R. Lambeth Townsend, do hereby certify that a true and correct copy of the foregoing On Writ of Certiorari to the Supreme Court of the State of California, was mailed certified mail, return receipt requested, this _____ day of September, 1983, to the following:

Warren M. Christopher, Esq.
400 South Hope Street
Los Angeles, California 90071-2899

Gary R. Netzer
Assistant City Attorney
1800 City Hall East
200 North Main Street
Los Angeles, California 90012

Rex E. Lee, Solicitor General
Department of Justice
Washington, D.C. 20530

John K. Van De Kamp, Attorney
General of the State of California
3580 Wilshire Boulevard
Los Angeles, California 90010

Edgar B. Washburn, Esq.
One Embarcadero Center
Suite 2407
San Francisco, California 94111

Ronald A. Zumbrun, Esq.
John H. Findley, Esq.
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, California 95814

Signed this _____ day of September, 1983.

R. LAMBETH TOWNSEND

APPENDIX A

Section 33.001.

(a) The surface estate in the coastal public land of this state constitutes an important and valuable asset dedicated to the permanent school fund and to all the people of Texas, and it is the declared policy of this state that the estate be managed pursuant to the policies stated in the following subsections of this section.

(b) The natural resources of the surface estate in coastal public land shall be preserved. These resources include the natural aesthetic values of those areas and the value of the areas in their natural state for the protection and nurture of all types of marine life and wildlife.

(c) Uses which the public at large may enjoy and in which the public at large may participate shall take priority over those uses which are limited to fewer individuals.

(d) The public interest in navigation in the intracoastal water shall be protected.

(e) Unauthorized use of coastal public land shall be prevented.

(f) Utilization and development of the surface state in the coastal public land shall not be allowed unless the public interest as expressed by this chapter is not significantly impaired by it.

(g) For the purposes of this chapter, the surface estate in coastal public land shall not be alienated except by the granting of leaseholds and lesser interests and by exchanges of coastal public land for littoral property as provided in this chapter.

(h) Vested rights in land shall be protected, subject to the paramount authority of the state in the exercise of police powers to regulate the exercise of these rights, and the orderly use of littoral property in a manner consistent with the public policy of this state shall not be impaired.

TEX.NAT.RES. CODE §33.004 sets out relevant definitions. Note especially (11) "submerged land":

(5) "Coastal area" means the geographic area comprising all the counties in Texas which have any tidewater shoreline, including that portion of the bed and water of the Gulf of Mexico within the jurisdiction of the State of Texas.

and

(11) "Submerged land" means any land extending from the boundary between the land of the state and the littoral owners seaward to the low-water mark on any saltwater lake, bay, inlet, estuary, or inland water within the tidewater limits, and any land lying beneath the body of water, but for the purposes of this chapter only, shall exclude beaches bordering on and the water of the open Gulf of Mexico and the land lying beneath this water.

APPENDIX B

Section 1.011. Property of the State.

(a) All wild animals, fur-bearing animals, wild birds, and wild fowl inside the borders of this state are the property of the people of this state.

(b) All fish and other aquatic animal life contained in the freshwater rivers, creeks, and streams and in lakes or sloughs subject to overflow from rivers or other streams within the borders of this state are the property of the people of this state.

(c) All the beds and bottoms and the products of the beds and bottoms of the public rivers, bayous, lagoons, creeks, lakes, bays, and inlets in this state and of that part of the Gulf of Mexico within the jurisdiction of this state are the property of this state. The state may permit the use of the waters and bottoms and the taking of the products of the bottoms and waters.

(d) The Parks and Wildlife Department shall regulate the taking and conservation of fish, oysters, shrimp, crabs, turtles, terrapins, mussels, lobsters, and all other kinds and forms of marine life, or sand, gravel, marl, mud shell, and all other kinds of shell in accordance with the authority vested in it by this code.

APPENDIX C

Section 61.011. Public Policy.

It is declared and affirmed to be the public policy of this state that the public, individually and collectively, shall have the free and unrestricted right of ingress and egress to and from the state-owned beaches bordering on the seaward shore of the Gulf of Mexico, or if the public has acquired a right of use or easement to or over an area by prescription, dedication, or has retained a right by virtue of continuous right in the public, the public shall have the free and unrestricted right of ingress and egress to the larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico.

APPENDIX D

Section 5.302. Declaration of Policy

The conservation and best utilization of the water resources of this state are a public necessity, and it is in the interest of the people of the state to require recordation with the commission of claims of water rights which are presently unrecorded, to limit the exercise of these claims to actual use, and to provide for the adjudication and administration of water rights to the end that the surface-water resources of the state may be put to their greatest beneficial use. Therefore, this subchapter is in furtherance of the public rights, duties, and functions mentioned in this section and in response to the mandate expressed in Article XVI, Section 59, of the Texas Constitution, and is in the exercise of the police powers of the state in the interest of the public welfare.